UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Mountaire Farms, Inc,
Employer,

and Case No. 05-RD-256888

United Food & Commercial Workers Union,
Local 27,
Union,

and

Oscar Cruz Sosa,
Petitioner.

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

On February 25, 2020, Petitioner Oscar Cruz Sosa ("Petitioner" or "Mr. Cruz Sosa") filed a petition to decertify his exclusive bargaining representative, United Food & Commercial Workers Union, Local 27 ("UFCW" or "Union"), with the requisite showing of interest. Unless overruled or an exception is found, the National Labor Relations Board's ("NLRB" or "Board") "contract bar" doctrine requires dismissal of the petition, thereby prohibiting Petitioner and his co-workers from exercising their fundamental right to choose their representative until 2022. The contract bar is a Board-created limitation on employees' statutory rights. It is not found in the text of the National Labor Relations Act ("NLRA" or "Act"), *see NLRB v. Dominick's Finer Foods, Inc.*, 28 F.3d 678, 683 (7th Cir. 1994), and it conflicts with the Act's core purpose. The Board was correct to grant review to reevaluate the contract bar and should use this opportunity to eliminate it. "If the rights of employees are being disregarded," it is incumbent upon the Board "to take affirmative action to effectuate the policies of the Act" and ensure that "those rights be restored." *McCormick Constr. Co. (Local 542, Operating Eng'rs)*, 126 NLRB 1246, 1259 (1960).

This case is only the latest example of an employee's election petition being threatened with dismissal because of the contract bar's unwarranted restrictions. Mr. Cruz Sosa filed his decertification petition because he was dissatisfied with the Union's representation, its contract, and its requirement that he pay compulsory dues or be fired. At the time Mr. Cruz Sosa filed this decertification petition—and due to a fortuity out of his control—his employer, Mountaire Farms ("Mountaire") and the UFCW had agreed to a five-year collective bargaining agreement ("CBA") with effective dates of December 22, 2018 to

December 21, 2023. Unless a narrow exception applies under cases like *Paragon Products Corp*., 134 NLRB 662 (1961), the contract bar mandates dismissal of this and all similar petitions to oust the Union or switch representatives for the first three years of the CBA—even in the face of objective evidence proving the Union has lost majority support. *Gen. Cable Corp.*, 139 NLRB 1123 (1962).

Over many decades the contract bar has trapped countless employees in an unwanted exclusive bargaining relationship and made the union the employees' master and the employees "prisoners of the Union." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 73 (1975) (Douglas, J., dissenting). Moreover, the contract bar as currently established is not simply a three-year limitation on the filing of an election petition: even if employees wait the requisite three years, they must then contend with byzantine rules, unforgiving time-periods, and complicated contract language over which they have no control, any one of which could lead the Board to dismiss the petition. These impediments have real-world consequences, and have contributed to the fact that the vast majority of union-represented employees in the United States—an astonishing 94%—have never voted for the union that exclusively represents them.[1]

The Board should reconsider and reject the contract bar in its entirety. That bar is not found in the Act and was rejected by the very first Board in 1936. Its current form stems from decades of incremental increases in union power and administrative overreach at the

[1] James Sherk, "Unelected Representatives: 94 percent of Union Members Never Voted for a Union," Heritage Found., *Backgrounder* No. 3126 (Aug. 30, 2016), http://www.heritage.org/research/reports/2016/08/unelected-representatives-94-percent-of-union-members-never-voted-for-a-union.

expense of employee free choice. The Board should take this opportunity to correct its errors and eliminate the contract bar.

In the alternative, if the Board retains any contract bar, that bar should last no more than one year and begin to run no less than forty-five days after the employer and union: (1) post a notice to employees informing them that a contract was executed and where at the workplace any employee can obtain a copy of that contract, and (2) make the complete contract available at the designated workplace location, as well as publish it online absent extenuating circumstances. This alternative streamlines the process for employees by creating a single "open period" running from the end of any contract bar until after employees are informed about a new contract. This alternative also facilitates informed employee choice about union representation.

FACTS AND PROCEDURAL HISTORY[2]

Petitioner is a long-time employee of Mountaire at a poultry processing plant in Selbyville, Delaware. UFCW is the exclusive bargaining representative for a unit of processing employees at that plant, including Petitioner.

Mountaire and UFCW are parties to a CBA that was executed on February 8, 2019. The CBA is retroactive to December 22, 2018, and expires December 21, 2023. Its "union security clause" states, in pertinent part:

> It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the execution date of this Agreement shall remain members in good standing, and those who are not members on the execution date of this

[2] This factual overview is derived largely from the Regional Director's April 8, 2020 Decision and Direction of Election, with which Petitioner generally agrees.

> Agreement shall, on or after the thirty-first day following the beginning of such employment, even if those days are not consecutive, shall become and remain members in good standing in the Union.

CBA Art. 3 (*See* App. A to UFCW's Request for Review, filed April 21, 2020).

On February 25, 2020, Petitioner filed his decertification petition supported by the requisite number of signatures for a showing of interest. On March 10, 2020, NLRB Region 5 held a representation hearing, at which UFCW argued that the contract bar prohibited Petitioner's election and required dismissal of his case. On April 8, 2020, the Regional Director issued a Decision & Direction of Election ("DDE"), finding the CBA did not bar the election because the agreement's union security clause is facially unlawful. *See* DDE at 5-9.[3]

Unwilling to accept the DDE and proceed to a prompt election, UFCW filed this Request for Review. Petitioner opposed the request. In his opposition, Petitioner argued, alternatively, that "[i]f the Board grants review in this case to clarify when and how the contract bar operates, it should actually use this case to overrule or greatly narrow the existence of such a bar." (Pet. Opp. to RFR at 3 (Apr. 28, 2020)).

On June 23, 2020, the Board granted UFCW's Request for Review, finding it raised "substantial issues warranting review." The Board also found "merit in the Petitioner's contention that it is appropriate for the Board to undertake in this case a general review of its contract bar doctrine." On July 7, 2020, the Board issued a Notice and Invitation to File

[3] The Board can take administrative notice that, after the Regional Director issued his DDE, Petitioner filed an unfair labor practice charge against UFCW to recoup some of the dues money it seized pursuant to that facially unlawful union security clause. *See UFCW Local 27 (Mountaire Farms, Inc.)*, No. 05-CB-259415. That charge remains pending in Region 5.

Briefs, asking the parties and amici to brief whether to: (1) rescind the contract-bar doctrine, (2) retain it as it currently exists, or (3) retain the doctrine with modifications.

Despite UFCW's objections and requests to halt the election, Region 5 conducted a mail ballot election from June 23, 2020 to July 15, 2020, and the ballots are now impounded.

ARGUMENT

I. The Contract Bar Should Be Eliminated.

The "contract bar" is a Board invention with no basis in the text of NLRA Section 9 or in the Act's legislative history. The bar should be dispensed with on this ground alone, as the first Board correctly held in *New England Transportation Co.*, 1 NLRB 130, 136–39 (1936). The contract bar also should be dispensed with because it entrenches unions that lack majority employee support, thereby undermining the cornerstone of the Act—employees' Sections 7 and 9 right to choose or reject union representation. 29 U.S.C. §§ 157 & 159. The Board should eliminate the contract bar, uphold the Regional Director's DDE on that ground, and order the impounded votes from the July 2020 election counted.

A. The Contract Bar Contradicts the Act and Fundamental Legal Principles.

1. The contract bar is not found in the Act.

The contract bar has no basis in the text of the Act. It is a purely Board-created device, *Dominick's Finer Foods*, 28 F.3d at 683, and goes well beyond any limits on elections Congress contemplated. When Congress enacted the NLRA, it created only one bar to elections—the "election bar," which prohibits elections for one year after a valid election has been conducted. *See* 29 U.S.C. §§ 159(c)(3) & 159(e)(2). These were the sole limits

Congress placed on employees' right to petition for elections and "bargain collectively through representatives of their own choosing," or to refrain from doing so. 29 U.S.C § 157. That Congress did not provide bars on employee free choice beyond the one-year "election bar" suggests the contract bar deviates from the statute Congress enacted. The fact that the contract bar is now three times *longer* than Congress' one-year election bar further indicates that the contract bar contradicts congressional intent.

Consistent with this understanding, the first Board rejected altogether a contract bar in its earliest interpretation of the Act. "The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives . . . ." *New England Transp. Co.*, 1 NLRB at 138.[4] Not until decades later, in *General Cable Corp.* 139 NLRB 1123 (1962), did the Board concoct the current three-year bar. The Board should return to its initial, correct assessment that the Act favors full freedom of association and forecloses any contract bar.

2. The contract bar contradicts the Act's guiding principle: employee free choice.

Employee self-representation and free choice are the Act's paramount objectives. Section 7 of the Act could not be clearer: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . *and shall also have the right to refrain from any*

[4] *New England Transportation* cited favorably to the National Mediation Board's election procedures, which recognize employees' full freedom of association and lack any contract bar. *Id.* at 139.

or all such activities . . . ." 29 U.S.C. § 157 (emphasis added).[5] As the D.C. Circuit recently stated: "The *raison d'être* of the National Labor Relations Act's protections for union representation is to vindicate the *employees'* right to engage in collective activity and to empower *employees* to freely choose their own labor representatives." *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018).

NLRA Section 9(a) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by *the majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. § 159(a) (emphasis added). Thus, the Act permits exclusive representation only if a majority of employees support that union's representation. *See Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring). "The Act's twin pillars are freedom of choice and majority rule in employee selection of representatives." *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1151 (D.C. Cir. 2017) (internal quotations & citations omitted). Without the actual support of a majority of employees, exclusive representation violates the Act. *Garment Workers'*, 366 U.S. at 737-39.

[5] Similarly, Section 8(a)(3) precludes "discrimination in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership in any labor organization*." 29 U.S.C. § 158(a)(3) (emphasis added). Further, Section 9 grants employees the right to file an election petition "alleging that a substantial number of employees (i) wish to be represented for collective bargaining . . . or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, *is no longer a representative* as defined in [section 9(a)]." 29 U.S.C. § 159(c)(1)(A) (emphasis added).

The contract bar, which has the effect of forcing unwanted representation on employees for a lengthy time, is inimical to the purpose and policies of the NLRA. The contract bar contradicts the Act's well-established "bedrock principles of employee free choice and majority rule," *Gourmet Foods, Inc.*, 270 NLRB 578, 588 (1984) (Member Dennis, concurring), because it allows a union to continue to exclusively represent employees even in the face of objective evidence proving the union has lost majority support.

Many Board members have recognized that election bars frustrate employee free choice. *See, e.g.*, *UGL-UNICCO Serv. Co.*, 357 NLRB 801, 810 (2011) (Member Hayes, dissenting) (an election bar does not aid employee free choice, but serves only "the ideological goal of insulating union representation from challenge whenever possible.") *Americold Logistics LLC*, 362 NLRB 493, 503 (2015) (Member Miscimarra, dissenting) (the various bars' main purpose is to "protect [incumbent] unions from decertification or displacement by a rival union."). Other Board members, however, have asserted that so-called "industrial stability" or "labor peace" justifies sundry non-statutory restrictions on employee free choice. *See, e.g.*, *Lamons Gasket Co.*, 357 NLRB 739 (2011). The latter Board members were mistaken for many reasons.

First, as discussed above, the Act's policy of "encouraging the practice and procedure of collective bargaining," 29 U.S.C. § 151, depends on a majority of employees *wanting* to engage in collective bargaining through an exclusive representative. *See Levitz Furniture Co.*, 333 NLRB 717, 731 (2001) (Member Hurtgen, concurring) (recognizing that the NLRA "pronounce[s] a policy under which our nation protects and encourages the practice and procedure of collective bargaining for those employees *who have freely chosen to*

engage in it."). If a majority of employees do not want to engage in collective bargaining, the Act does not favor exclusive representation. "There could be no clearer abridgment of Section 7 of the Act" than to "grant[ ] exclusive bargaining status to an agency selected by a minority of its employees." *Garment Workers'*, 366 U.S. at 737. In short, "unions exist at the pleasure of the employees they represent. Unions *represent* employees; employees do not exist to ensure the survival or success of unions." *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999) (Member Brame, dissenting).

Thus, the Act's policy interest in "encourag[ing] the practice and procedure of collective bargaining" favors holding elections whenever a question concerning representation arises, not barring those elections for arbitrary time periods. Only with an election can the Board determine whether employees subject to a union's exclusive representation support or oppose continuing to engage in "the practice and procedure of collective bargaining."

Second, the continued imposition of a minority union on unwilling employees weakens industrial stability because it leads to employee frustration and even outrage at the injustice of unwanted representation. If "industrial stability" is supposed to produce contented workers and no strikes, walkouts, or workplace dissension that slows production, how is that achieved when a minority union and an unpopular CBA are foisted on employees? Indeed, industrial stability is diminished when employees are barred from voting on their incumbent union and, even worse, are simultaneously barred from voting on whether to ratify or reject the union's proffered CBA. *See, e.g.*, *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967) ("It is within [the unions'] province to

determine whether or not their bargaining unit may enter into a binding contract with or without membership ratification."); *accord Movers & Warehousemen's Assn v. NLRB*, 550 F.2d 962, 965 (4th Cir. 1977); *N. Country Motors Ltd.*, 146 NLRB 671, 674 (1964) ("The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf.").

Third, barring employees from voting on union representation once a contract is in place does not aid industrial stability because employees usually cannot judge a union's effectiveness until *after* it agrees to a contract. Employees presented with a new CBA should be able to vote promptly on whether they wish to work under that union's representation and that particular CBA. This is especially true since, as pointed out above, employees possess a statutory right to an election under NLRA Section 9, but no statutory right to ratify or disapprove the union's proffered contract. *Houchens Market*, 375 F.2d at 212. Thus, current law provides employees dissatisfied with a newly negotiated CBA little or no recourse, largely because the contract bar locks them in and prevents them from voting on workplace representation for up to three years.

Fourth, the contract bar thwarts industrial stability by allowing unions and employers effectively to collude at employee expense. With the contract bar, both unions and employers have the incentive to enter into sweetheart contracts because employees cannot throw off a contract's yoke for at least three years, no matter how unfavorable it is to employees' rights and interests. *See Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 537 (D.C. Cir. 2003) (recognizing that "colluding" employers and unions can misuse the contract bar "at the expense of employees and rival unions"); *YWCA of W. Mass.*, 349 NLRB 762, 764

(2007) (recognizing the "danger that unions and employers may collude to defeat employees' representational wishes on the basis of illusory or fabricated agreements.").

Fifth, experience shows the contract bar is unnecessary for industrial stability. For nearly sixty years, employers and unions have entered into long-term CBAs such as five-year agreements, which do not provide contract bar protection for the final two years of the agreement. *See, e.g.*, *Coca-Cola Enters., Inc.*, 352 NLRB 1044 (2008) (describing long-term agreements). Although five-year agreements provide two fully "open" years at the agreements' end, there has not been a rash of decertification elections that follow the first three years *just because* a bar does not happen to exist for those years. It follows that eliminating the contract bar in its entirety will not precipitate a rush of decertification petitions during the first three years of a contract. Rather, it will merely allow those employees who *are* dissatisfied with their union to exercise their statutory rights under NLRA Sections 7 and 9 to be free from representation, the same as those employees who file petitions after three years of their long-term contract. *Shaw's Supermarkets, Inc.*, 350 NLRB 585 (2007) (employer may rely on evidence of actual loss of majority support to withdraw recognition from a union after the third year of a contract of longer duration).

Finally, the contract bar contradicts one of the most enduring and cherished principles of common law—that an agent serves at the pleasure of the principal and can be removed by the principal at any time. *See generally Comm'r of Internal Revenue v. Banks*, 543 U.S. 426, 436 (2005) (discussing the principal-agent relationship). Under the modern labor law paradigm, unions are the employees' fiduciary agent and the employees are the principal, presumably clothed with the power to discharge that agent if they so choose. *Teamsters*

Local No. 391 v. Terry, 494 U.S. 558, 567 (1990) (analogizing the union-employee relationship to a trustee-beneficiary relationship, where the "trustee must act in the best interests of the beneficiaries."). The contract bar undermines this principle and holds employees hostage to an agent they may no longer want. *Emporium Capwell Co.*, 420 U.S. at 73 (Douglas, J., dissenting) (employees should not be "prisoners of the Union."). A union cannot properly act as the employees' fiduciary agent when there is a question of whether it remains their majority representative, or worse, if is known to be a *minority* representative. Yet the contract bar allows unions to regularly engage in such questionable representation because employees are forbidden from ousting them. Eliminating the contract bar will align Board law with established legal doctrines that allow principals to choose when and how agents speak for them and bind them to contracts.

In short, the contract bar conflicts with the purpose and stated policy of the Act, and does nothing to enhance industrial stability. The bar should be eliminated.

B. The Contract Bar Has for Many Decades Hindered or Destroyed Employees' Rights Under NLRA Sections 7 and 9.

In practice, the contract bar has led to decades of litigation and a morass of rules and restrictions that grossly infringe on employees' Sections 7 and 9 rights. Far from ensuring the NLRA's neutrality concerning employees' decision to select a union or be unrepresented, *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001), the contract bar entrenches incumbent unions by keeping them in power almost indefinitely. Employees are stuck with unwanted unions unless they collect signatures and file a petition during a short 30-day "open period" that falls 60–90 days (or 90–120 days in the health care

industry) before the end of a three-year contract, or during a hiatus with an unknown end date. This confusing process leads to virtually permanent unionization through inertia, frustration, or legal machinations, not willful free choice. It is no wonder 94% of employees have never voted for the union that purports to represent them. *See* n.1, *supra*. Consumer advocates would rightly condemn a health club that created byzantine rules to make it virtually impossible for customers to end their memberships. The same should be condemned and changed here regarding the NLRB's complex contract bar rules.

Petitioner will now discuss each of the major hurdles employees face under the contract bar regime.

1. The three-year term of a contract bar harms employees.

The current contract bar prohibits employees from filing a decertification petition for the term of a CBA or for three years, whichever is shorter. *See Gen. Cable Corp.*, 139 NLRB 1123. This three-year bar stems from years of incremental increase in infringements of employee rights. As noted above, the first Board correctly rejected a contract bar. *New Eng. Transp. Co.*, 1 NLRB 130. Later, the Board abandoned that interpretation and adopted a one-year contract bar. *Nat'l Sugar Refin. Co.*, 10 NLRB 1410, 1415 (1939) (creating a contract bar on the extremely thin rationale that it was not "contrary to the purposes and policies of the Act"). The bar was later extended to agreements lasting at least two years, *Reed Roller Bit Co.*, 72 NLRB 927 (1947); *Pacific Coast Ass'n of Pulp & Paper Manufacturers*, 121 NLRB 990 (1958), and finally to agreements lasting three years, *General Cable Corp.*, 139 NLRB 1123 (1962).

The Board's discussion in *General Cable Corp.*, 139 NLRB at 1124-29, shows the three-year contract bar impermissibly relegates employee rights to an afterthought, subordinated entirely to unions' and employers' administrative convenience:

> In adopting a 3-year rule we have heeded the appeals for a more extended contract-bar period presented in oral arguments, letters, telegrams, memorandums, and briefs by the overwhelming majority of labor and management representatives. Indeed, this substantially unified stand of both labor and management has been a most important consideration in arriving at our decision.

Id. at 1125. The Board in *General Cable Corp.* failed to pay more than lip service to employees' paramount interests in free choice, baldly stating as an *ipse dixit*: "such [three-year bar] rule on balance will not seriously impair employee freedom of choice." *Id*. at 1128. But Mr. Cruz Sosa, stuck in a union he vehemently opposes, with a substandard contract that requires him to pay compulsory dues for almost five long years or be fired, disagrees.

Mr. Cruz Sosa filed his petition on February 25, 2020, over a year after UFCW and Mountaire executed their CBA. He and his fellow employees were unhappy with that CBA and their union representative, and made a conscious choice to exercise their right to vote out UFCW. If UFCW succeeds in its argument that his petition is barred, Mr. Cruz Sosa and his fellow employees will be subject to its representation for several additional years and be forced to pay dues to a union they would otherwise oust, all because of an arbitrary and non-statutory three-year prohibition on decertification elections. Moreover, this three-year bar self-perpetuates for contracts like the Mountaire CBA that contain automatic renewal provisions, because the Board allows each automatic renewal to constitute a new

contract bar. *See* CBA Art. 22 (App. A to UFCW's Request for Rev., filed April 21, 2020); *Koenig Bros., Inc.*, 108 NLRB 304 (1954).

Even if an employee waits until his three-year bar period ends, it can be extremely difficult to calculate dates and comply with the contract bar's byzantine rules and time windows. For example, if Mr. Cruz Sosa wanted to wait until the three-year contract bar expires at Mountaire, he would have difficulty calculating the proper date to file a petition. UFCW and Mountaire signed their CBA on February 8, 2019, but the CBA states that it was effective on December 22, 2018, and UFCW argued at the representation hearing that this was the operative date the contract was agreed to. DDE at 4. If Mr. Cruz Sosa used the text of the contract to determine when he should file his petition, he likely would file prematurely based on the December 22, 2018 "effective" date. *See also Quality King Distribs., Inc.*, No. 29-RD-071777 (Feb. 15, 2012) (dismissing petition based on preamble date, despite no specific evidence of when the contract was executed). And such situations are not exceptional, as there are a myriad of cases in which convoluted contractual provisions significantly prejudiced employees wishing to exercise their statutory right to choose or dismiss their representative.

For example, in *Smith's Food & Drug Centers, Inc.*, No 27-RD-141924 (Order dated Feb. 13, 2015), a regional director dismissed a petition as untimely because, although the applicable memorandum of agreement did not have an automatic renewal provision, it incorporated by reference a contract that incorporated by reference a second contract containing such a provision. The regional director held this third-order automatic renewal provision created a new contract upon expiration of the CBA, and barred an election. With

no apparent sense of irony, the regional director held that the CBA "clearly and unambiguously" incorporated an automatic renewal provision in a 1996 contract, despite recognizing the automatic renewal provision:

> requires reference to the 1996 Utah Foodhandlers' Agreement (possibly as modified by the 2001 Salt Lake County Settlement), as modified by the 2001 Cedar City Settlement, and finally as modified by the 2006 Cedar City Settlement. Review of the 2001 Salt Lake County Settlement, the 2001 Cedar City Settlement, the 2006 Cedar City Settlement, and the 2009 MOA reveals that the expiration dates listed in those agreements only changed the start and end dates of the various agreements (the term of the agreement). None of the agreements explicitly eliminated the automatic renewal language contained in the 1996 Foodhandlers' Agreement.

Order at 20. Thus, the employees were prevented from exercising the Section 9 rights Congress gave them because of a decades-old automatic renewal provision they would have had no reasonable way to know existed. *See also Compass Grp. USA, Inc.*, No. 30-RD-068358 (Order dated Dec. 2, 2011) (holding a successor's adopting a CBA—which at the time of adoption did not operate as a bar to an election—constituted a new contract and operated as a bar until the expiration of the CBA).

Similarly, in *Forsythe Transportation, Inc.*, No. 05-RD-068230 (Order dated Dec. 1, 2011), the regional director dismissed a petition as untimely even though employees were kept in the dark about when they could timely file a petition. In that case, the CBA contained an automatic renewal provision and an expiration date of October 31, 2011. During the term of the contract, the parties changed the expiration date three times: to June 30, 2010, then to July 2011, and then again to October 2011. These changes were not communicated to employees. On September 22, 2011, an employee brought the contract (with the October 31, 2011 expiration date) to the Board's Washington Resident Office to

ask about filing a timely petition. The information officer misinformed the employee that he had missed his window period, but could file after the contract expired on October 31, 2011 and before a new agreement was signed. The employee filed his petition on November 4, which was dismissed as untimely because of the automatic renewal provision. *See also Suffolk Banana Co.*, 328 NLRB 1086 (1999) (contract does not forfeit "bar quality" even with an uncertain expiration date); *Watkins Sec. Agency of DC, Inc.*, No. 05-RD-201720 (Order dated Aug. 16, 2017) (contract barred an election despite containing three sets of potential operative dates for decertification). All of these situations make a reasonable person wonder if the NLRB election process was purposefully designed to be a cruel pitfall for the unwary—the victims of which are most often employees acting *pro se*.

2. The insulated period and window periods harm employees.

As currently constituted, the contract bar allows employees to decertify a union during a short, 30-day window period, generally 60–90 days before contract expiration, or 90–120 days in the health care industry. The time between the end of the window period and contract expiration is the Board's "insulated" period, during which decertification is prohibited.

The insulated period and window periods developed much as the contract bar itself—incrementally, arbitrarily and heavily favoring incumbent unions. In *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), the Board first adopted the "insulated period" sixty days from the expiration of the applicable CBA and specified a window period for petitions to be filed 150–60 days prior to contract expiration. *Id.* at 1000. In *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962), the Board reassessed this open period as much

too long, and reduced it to a mere 30 days, 60–90 days before contract expiration. Further complicating matters, in *Trinity Lutheran Hospital*, 218 NLRB 199 (1975), the Board created a separate 30-day window period 90–120 days before contract expiration for contracts involving health care institutions, discarding employee concerns and finding "no reason to provide more than a 30-day open period." *Id.* at 199.

The thirty-day window period, stuck arbitrarily near the end of a contract lasting for up to three years, reveals precisely how the Board's rules tilt the scales to favor incumbent unions and their experienced labor lawyers at the expense of unschooled employees: the "insulated period" during which the union is safe from all decertification petitions is twice as long as the period during which an employee (who has no specialized knowledge of labor law) can file for decertification.

Indeed, this complex regime requires employees who wish to challenge the incumbent union to have sophisticated legal knowledge of these fleeting window periods, as well as the foresight to plan their decertification efforts (*e.g.*, collecting a valid showing of interest with proper language on an authorization card or petition, *see Wyman Gordon Pennsylvania, LLC*, 368 NLRB No. 150 (Dec. 16, 2019) at 8–9) far in advance of the contract's expiration. By the time employees learn of their right to decertify the union, the thirty-day window period may have already passed. And, if the window period is missed, employees may have no opportunity to file for an election for another three years if their employer and union fortuitously agree to a successor contract during the insulated period.

These inflexible open and insulated periods have real consequences for employees simply seeking to exercise the rights Congress gave to them. For example, in *Community*

Support Services, Inc., No. 08-RD-218872 (Order dated June 25, 2018), an employee filed a petition during the open period 60–90 days prior to contract expiration. However, the regional director found that the 90–120 day health care window period applied to the unit and dismissed the petition as untimely, despite the employer's argument it was not a health care institution because it did not directly supply health care but instead operated as a "connector" for care. Thus, employees were prevented from exercising their Section 9 rights because of an arguable, ambiguous, and unforgiving legal technicality—whether they were "healthcare employees."

Finally, in *La Jicarita Rural Telephone Cooperative*, No. 28-RD-001008 (Order dated Jan. 24, 2011), an employee filed a petition one day before the contract (and therefore the insulated period) expired. The regional director not only dismissed the petition as untimely, but also granted the union *another sixty-day insulated period*, despite the alleged encroachment of a single day. Thus, an understandable mistake of filing one day early not only prevented employees from re-filing their petition for a sixty-day period, but could have prevented them from filing another petition for up to three years if a new contract was reached. *See generally Appalachian Shale Prods. Co.*, 121 NLRB 1160, 1164 (1958) (dismissing a petition filed within the insulated period). Again, the contract bar system seems purposefully designed to be a gigantic pitfall for unwary employees, and the Board should overrule it.

3. Contract hiatus rules are confusing for employees.

If an employee waits for the contract bar to end and a contract hiatus to occur before filing for decertification, he is subject to yet another set of arbitrary Board-created rules

and limitations on his ability to file, to wit: Board precedent recognizes contract formation as a key contract bar date, even before an actual contract is formed or executed, based on informal and pre-contractual documents to which an employee is rarely privy. These often unpublicized documents can and do surprise employees, who mistakenly believe their petition is timely because the parties have not yet publicly executed a contract.[6]

For employees seeking to decertify during a hiatus period of uncertain length, the operative question for timely filing is: what constitutes a valid contract for purposes of ending the contract hiatus? The Board outlined its policy for determining this question in *Appalachian Shale*. There, the Board held that for a contract to constitute a bar, it must: (1) contain "substantial terms and conditions of employment," and (2) be signed by all parties before the filing of a petition. *Id.* 121 NLRB at 1162. Despite these seemingly clear rules, the Board has also recognized that a "contract" can bar an election even when it consists only of informal documents or an "exchange of a written proposal and a written acceptance, both signed." *Id.*

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[6] It is not uncommon for employees seeking to decertify to learn that secret agreements or understandings, to which they were not privy, had a determinative effect on their Sections 7 and 9 rights. *See, e.g.*, *USF Holland LLC*, No. 18-RD-239688 (Order dated May 7, 2019 and Board Order denying review dated Nov. 7, 2019), where a decertification petition was dismissed because the original bargaining unit of about 12 employees was merged into a nationwide unit of 20,000 without the original employees' knowledge and assent). Moreover, it is not uncommon for unions to enter into secret agreements with employers that compromise employee interests, despite the fiduciary duties owed to those employees. *See, e.g.*, *Merk v. Jewel Food Stores Div. of Jewel Cos., Inc.*, 945 F.2d 889 (7th Cir. 1991) (secret agreement violates federal labor policy); *Aguinaga v. United Food & Com. Workers*, 993 F.2d 1463 (10th Cir. 1993) (condemning a secret agreement between a union and employer); *Lewis v. Tuscan Dairy Farms, Inc*., 25 F.3d 1138 (2d Cir. 1984) (union's secret agreement with employer not to enforce employees' seniority rights breached the duty of fair representation).

While these rules might seem like a logical application of basic contract formation principles, in practice they punish employees for missing deadlines over which they have no control and are likely unaware, and are ripe for abuse by unions and colluding employers. Individual employees are often kept in the dark about bargaining progress and do not know exactly when a contract was or will be executed, or what constitutes agreement on enough substantive terms to meet the *Appalachian Shale* tests. Union officials can sign and enter into contracts without ratification votes or notice to the unit employees, *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224, 224 & n.2 (1991) (Member Stephens, concurring), and often rush through substandard contracts that harm employee interests solely to avoid a contract hiatus or a new "open period."[7]

In the wake of *Appalachian Shale*, the Board expanded its understanding of what constitutes a contract to include a wide range of pre-formation contract materials. For example, in *Georgia Purchasing, Inc.*, 230 NLRB 1174 (1977), the Board held an exchange of telegrams two days before a petition was filed was sufficient to bar an election, despite differences between what was referenced in the telegrams and what was actually signed. Further, a "contract" under current Board law can be shown through: telegrams, *id.*; tentative agreements, *Seton Medical Center*, 317 NLRB 87, 87–88 (1995 (citing *St. Mary's Hospital*, 317 NLRB 89, 90 (1995)); e-mail exchanges, *Inwood Material Terminal,*

[7] Do these pre-formation contract materials serve as the beginning of the contract bar for purposes of calculating when an employee can decertify? The answer is surely no, otherwise most three-year contracts would have a duration of longer than three years and therefore have an open period for decertification at the end of the contract. This is a one-way street designed to frustrate employee free choice, which should not be allowed to continue.

LLC, No. 29-RD-206581, 2019 WL 656289, at n.1 (Jan. 30, 2019); informal offer letters incorporating certain terms by reference, *Liberty House*, 225 NLRB 869 (1976); and undated contracts, *Cooper Tank & Welding Corp.*, 328 NLRB 759 (1999) and *Western Roto Engravers, Inc.*, 168 NLRB 986 (1967).[8] In fact, the "Board does not require that an agreement delineate completely every single one of its provisions to qualify as a bar," as it only requires an agreement on "substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship." *St. Mary's Hosp.*, 317 NLRB at 90 (citing *Stur-Dee Health Prods., Inc.*, 248 NLRB 1100 (1980); *Levi Strauss & Co.*, 218 NLRB 625 (1975); *Spartan Aircraft Co.*, 98 NLRB 73 (1952)). In other words, the Board does not require an actual CBA to bar an election. *See generally Sarauer v. IAM Dist. No. 10*, 966 F.3d 661, 675-76 (7th Cir. 2020) (dispute over when a contract was formed for purposes of the Wisconsin Right to Work law raises a federal question).

The Board also does not require a *signed* contract to constitute a bar. In *Television Station WVTV*, 250 NLRB 198 (1980), the Board found that initials next to tentative agreement provisions sufficed as a signature, despite the parties having set a later date for the actual *signing* of the contract. *See id.* at 200–01 (Member Penello, dissenting) (discussing the legal problems with the Board's conclusion). In *Holiday Inn of Ft. Pierce*, 225 NLRB 1092 (1976), the Board found a cover letter, signed by the employer's attorney

[8] The execution date of a contract can be crucial for purposes of timely decertification in contracts with a duration of greater than three years. Allowing a union's contract to bar an election with no specific date of execution, while requiring employees to adhere to severe time restrictions based on specific dates, is yet another example of the Board impermissibly putting its thumb on the scale in favor of unions and against employee rights.

with copies of the contract attached, constituted a sufficient signing of a contract for purposes of the contract bar.

Based on these principles, a decertification petition that was "late" by a single day was dismissed in *Riverside Hospital*, 222 NLRB 907 (1976). There, the employer on May 1 sent the union copies of a contract proposal it requested, along with a signed cover letter explicitly contemplating that the transmitted proposal was not necessarily the final agreement—it anticipated potential counter-proposals and asked the union to notify the employer if it intended to ratify the contract proposal as sent. *Id.* As such, the proposal was not executed by the employer. On May 7, the union ratified the proposal. On May 8, a decertification petition was filed. The union did not mail its executed version of the contract until May 14, even though its execution of the contract was dated May 7. The Board held the employer's signature on the May 1 cover letter constituted a signature on the contract and therefore the May 7 date of the union's execution was deemed the date of the contract's completion. Despite these union and employer machinations, of which employees were unaware, the petition was considered untimely by a single day and was dismissed. Again, a cruel joke was perpetrated on the petitioner and perhaps a majority of his co-workers.

To make matters worse—if that were possible—NLRB regional directors have taken these principles and expanded them well outside the bounds of what is reasonable. For example:

- In *Centers for New Horizons, Inc.* No. 13-RD-143907 (Order dated Jan. 30, 2015 and RFR denied 2015 WL 1254861 (Mar. 19, 2015)), the regional director found an e-mail containing an attorney's *signature block*—in many cases an automatic

function of an e-mail program—with a contract proposal attached, to constitute a valid signature for purposes of the contract bar.

- In *Coast Auto Supply Co.*, No. 19-RD-064436 (Order dated Sept. 30, 2011), the regional director found an August 1 faxed contract with notations on it, combined with the employer's president's name written—not signed—on the fax cover sheet, to constitute a sufficient signature to bar an election. (Order at 5).
- In *Advent Cleaners LLC*, No. 28-RD-147672 (Order dated Nov. 10, 2015), the regional director found tentative agreements signed on February 16 and 26 sufficient to bar a petition filed March 6, despite the draft agreement being sent back and forth with amendments on March 5 and 8.
- In *Sugar-House HSP Gaming LP*, No. 04-RD-082208 (Order dated June 25, 2012), the regional director found an informal e-mail exchange between the union and employer on May 30, before union contract ratification—signed not with electronic signatures, or even formal names, but with "Thank you, Rob" and "W"—enough to bar an election for a petition filed June 1.

Even further limiting employee rights, a tie does not go to the "runner" when the proverbial "race to the court house" ends in a tie. Instead, the employee is out of luck and his election is barred. Even if a petition is filed *before* a contract is executed, but both occur on the same day, the contract bars the petition if the employer was not previously informed of the petition. *Deluxe Metal Furniture*, 121 NLRB at 999. In *Bendix Corp.*, 210 NLRB 1026 (1974), the Board held that a letter of agreement signed the same day as the

decertification petition was filed constituted a sufficient informal document to bar an election.

The employee-petitioner in *Central Ohio Gaming Ventures, LLC*, No. 9-RD-126599 (May 14, 2014), faced a similar situation. There, the employee filed his petition on April 15 at 12:16 pm. Later that day, the employer e-mailed the union: "[w]e have a deal." The regional director held that this message, along with a prior union acceptance, constituted a contract for purposes of the contract bar and dismissed the petition as untimely. Thus, an informal exchange of e-mails, of which employees had no knowledge and which was sent *after* their petition was filed, prevented them from exercising their Section 9 rights for several years. *See also New Hampshire Public Defender*, No. 01-RD-002102 (Order dated Aug. 28, 2007) (petitioner informed union and employer of her intent to file a decertification petition on August 1, which she mailed on July 31. The parties then rushed to sign a contract on July 31; consequently, the petition was dismissed as untimely). Cruel jokes, unseemly "races to the courthouse," and pitfalls for the unwary await employees who try to navigate these shoals.

In short, employee rights under NLRA Sections 7 and 9 should not depend upon unknowable, arbitrary, and sometimes purposefully rigged deadlines. Incumbent unions should no longer be allowed to rely on arcane technicalities and hidden documents to thwart elections and "game the system," especially when they are no longer wanted by a majority of those they purport to represent.[9] In *Appalachian Shale*, the Board noted it was:

[9] Even simple administrative errors can have draconian consequences for employees. In *Brunswick Bowling Products, LLC*, No. 07-RD-169464 (Mar. 4, 2016), *aff'd*, 364 NLRB No. 96

> reexamining its contract bar rules with a view toward simplifying and clarifying their application wherever feasible in the interest of more expeditious disposition of representation cases and of achieving a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives.

121 NLRB at 1160. But the vast amount of litigation over the minutiae of the contract bar rules and timelines shows that the Board has failed, in stunning fashion, to achieve this "balance." The Board should take this opportunity to return to simplicity and stability for *employees*—the real beneficiaries of the Act—and achieve the correct balance of the Act's policies through a rejection of the contract bar.

II. Alternatively, If the Board Maintains Any Contract Bar, It Should Be a One Year Bar with the Open Period at the Beginning of the Contract.

Alternatively, if the Board maintains any contract bar, that bar should be no longer than one year and begin to run no less than forty-five days after the employer and union: (1) post a notice to employees informing them that a contract was executed and where at the workplace any employee can obtain a copy of that contract, and (2) make the complete contract available at the designated workplace location, as well as publish it online absent extenuating circumstances. Under this approach, which is much like the Board's approach in voluntary recognition cases, employees would have at least a forty-five day open period

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(Aug. 25, 2016), the Region dismissed a petition as untimely because it did not receive the petitioner's initial showing of interest. Although the petitioner re-filed his petition and the showing of interest once he was informed of this fact, the second filing occurred after a contract was signed. The regional director took a hard line towards the petitioner: "Respondent's novel position that an otherwise valid contract bar can be overcome simply by a Petitioner's claimed error or ignorance to the processes and procedures of the NLRB appears to be completely without merit." (Order at 6). However, the regional director and the Board took a softer approach with the union when it committed the technical error of failing to allege the contract bar as an affirmative defense. Rather than consider the argument waived, the Board dismissed the petition on that basis. *See* 364 NLRB No. 96, slip op. at 4–5 (Member Miscimarra, dissenting in part).

at the *beginning* of a contract to determine if they want to continue with that union's representation, after having an opportunity to review the entire contract.

A. Any Contract Bar Should be Limited to One Year.

Petitioner has shown that no contract bar should exist. However, if the Board should choose to maintain any contract bar, it should be for no longer than one year. This one-year bar would match the first contract bar. *Nat'l Sugar Refin. Co.*, 10 NLRB 1410 (1939). It also would be more consistent with the one-year election bars Congress created, 29 U.S.C. §§ 159(c)(3) & (e)(2). It is absurd that a Board-created bar is three times longer—and thus three times more onerous to employee rights—than the election bar Congress itself created.

A reduction in the term of the contract bar to one year would promote employee freedom and union accountability without frustrating any interest in industrial stability. Collecting a sufficient showing of interest on a properly worded form and filing for decertification is onerous enough that employees would seek elections only when they believe they constitute a majority and can win. Experience with contracts exceeding three years has shown that employees do not engage in time-consuming and fruitless petitioning in the "open" years just to annoy or harass a union. Rather, employees call elections only when they feel a majority of their co-workers desire a change and when they believe they can successfully navigate the decertification process and win.

Congress understood that the Act vests unions with great power. A union can "subordinate the interests of an individual employee to the collective interests of . . . the bargaining unit," *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 269 (2009), and has "powers comparable to those possessed by a legislative body both to create and restrict the rights of

those whom it represents." *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944). Knowing this, Congress intended to foster robust workplace democracy to ensure that unions are accountable to the employees they represent. Congress created only a one-year election bar precisely to encourage that accountability. Anything more than a one-year contract bar undermines union accountability and harms employees.

B. The Open Period Should Be Placed at the Beginning Of The Contract by Having the Contract Bar Begin to Run No Less Than Forty-Five Days After Employees Are Notified of a Contract and Its Actual Terms.

Any contract bar retained by the Board should begin to run no less than forty-five days after the employer and union: (1) post a notice to employees informing them that a contract was executed and where at the workplace any employee can obtain a copy of that contract, and (2) make the complete contract available at the designated workplace location, as well as publish it online absent extenuating circumstances.[10] This would, in effect, create a single, simplified "open period," running from the expiration of any previous contract bar until at least 45 days after employees are properly informed about any newly executed contract. This new approach has several advantages over the current flawed approach.

First, it would enable employees to decide whether they want to support or oppose their union representative based on what the union produces at the bargaining table. The current 60–90 day open period, coming near the contract's end, requires employees to make this important decision based on speculation about future bargaining and unenforceable union

[10] By "complete contract" Petitioner means the full and actual terms of the CBA that the employer and union executed, including any side letters and addenda. He does not mean a summary of the contract or other propaganda about what the contract supposedly provides. He means the complete and actual contract.

promises about what will be achieved in negotiations. Under the current system, if the union ultimately signs a contract that fails to live up to its promises or employee expectations, employees have no recourse but to work under that unwanted and inadequate contract until the next open period—as long as three years.

In contrast, having the bar start only *after* employees are notified of a new contract and given an opportunity to review its complete terms allows them to make informed decisions concerning union representation, based on what the union actually obtained at the bargaining table. If employees support the contract and the union, they will not file an election petition. If they disapprove of the contract or the union, employees (the principals) can expeditiously act on that belief and hold union leaders (the employees' agents) accountable.

Allowing employees to decertify at the beginning of a contract, rather than during an arbitrary 30-day period before a contract's end, puts the horse in front of the cart and better facilitates informed employee choice concerning union representation. For this reason alone, if any contract bar remains in place, the open period should include the period immediately after employees are informed of the new contract.

Second, as discussed above, arbitrarily-created open periods near the end of a contract present pitfalls for the unwary that impair employees' ability to timely file petitions. Employees are often unaware of the 30-day open period coming 60–90 days (or 90–120 days in health care industries) before the end of the contract, and mistakenly file their petitions during the wrong periods through no fault of their own. (*See* contract bar cases discussed *supra* at 13–26). In contrast, employees will be better informed of this proposed

open period because the contract bar will not run until after they are formally notified that a new contract has been executed, and after complete copies have been made available for their review in person at the workplace or online. Such a process would obviate any argument for an insulated period.

Third, this new "open period" would simplify the procedure for employees seeking to decertify after a contract expires. Under this new formulation, the contract bar would expire upon one year or the expiration of a contract, and another bar would not commence until after the employer and union notify employees that a new contract has been executed and is available for review. This re-formulation avoids the current regime's pitfalls of employees not knowing when a contract begins, ends, or is extended. Employees often do not have this information because they are not parties to the negotiations or privy to what occurs at the bargaining table. *See, e.g.*, *Sarauer v. IAM Dist. No. 10*, 966 F.3d at 675–76 (extensive litigation over when a contract was formed). Esoteric Board rules governing when a contract is technically "executed" are pitfalls for the unwary. (*See* discussion, *supra* at 19–26). Starting the contract bar only *after* employees are notified by their employer and union that they have executed a contract, and that complete copies are available, eliminates in one stroke all of this uncertainty and its attendant litigation.

Fourth, this approach tracks the Board's procedures in related situations. For example, employees faced with their employer's "voluntary recognition" of a union are permitted to petition for an election during a forty-five day period that begins after they are notified of the recognition. *Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships*, 85 Fed. Reg.

18366 (Apr. 1, 2020); NLRB Rules & Regulations § 103.21. Similarly, in *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019), the Board adopted a forty-five day period for incumbent unions to file for an election to retain their status after they are notified of an employer's withdrawal of recognition. In both of these situations the open period is at the beginning of the process and starts once the pertinent party is notified, not at some arbitrary date near the end of the process. The open period for any contract bar should be structured similarly.

For all of these reasons, if the Board retains any contract bar, it should be of short duration and begin to run only after employees have had notice and a reasonable opportunity to review the complete contract. Specifically, any contract bar should be no longer than one year and begin to run no less than forty-five days after the employer and union: (1) post a notice to employees informing them that a contract was executed and where at the workplace any employee can obtain a copy of that contract, and (2) make the complete contract available at the designated workplace location, as well as publish it online absent extenuating circumstances.

III. The Current CBA Contains an Illegal Union Security Clause and Cannot Serve as a Bar.

Even if the Board makes no changes to the contract bar doctrine, Petitioner is still entitled to his election for the reasons expressed by the Regional Director in his DDE dated April 8, 2020. Under NLRA Section 8(a)(3), a union security clause must give employees at least 30 days to become "union members." 29 U.S.C. § 158(a)(3). That section states an employer may make an agreement with a labor organization to require "membership" as a

condition of employment only "therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ." This "provision is among the most carefully considered and completely defined elements of the policy embodied in the Taft-Hartley Act." *Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880, 884 (1958). A failure to provide the mandated statutory grace period automatically invalidates the union security clause. *Paragon Prods. Corp.*, 134 NLRB at 666. A CBA containing an illegal union security clause cannot serve as a contract bar. *Keystone Coat*, 121 NLRB at 884.

The union security provision in the Mountaire CBA requires employees either to join the union or pay a compulsory fee "31 days following the beginning of their employment." The provision does not provide current employees with the mandated 30 days after the execution of the agreement. As properly found by the Regional Director, "any incumbent employee who was hired prior to the Agreement's execution date—February 9, 2019—would have been denied the statutorily mandated 30-day grace period." DDE at 7. Under the plain terms of the contract, incumbent employees would have to pay dues immediately upon execution of the agreement. This is illegal. *See, e.g.*, *Checker Taxi Co*., 131 NLRB 611, 615 n.11 (1961); *Local No. 25, Int'l Brotherhood of Teamsters (Tech Weld Corporation)*, 220 NLRB 76 (1975); *Roza Watch Corp*., 249 NLRB 284 (1980).

UFCW has argued that the phrase "beginning of such employment" may be construed as the execution of the contract. (Union RFR at 3–5). However, this is an anti-textual reading of the clause. The phrase "such employment" clearly refers to the beginning of the non-member's employment. Had UFCW and Mountaire wanted to tie the union security

agreement to the execution of the contract, they would have written, "and those who are not members on the execution date of this Agreement shall, on or after the thirty-first day following the beginning of such employment [*or the execution of the contract, whichever is later*] . . . shall become and remain members in the Union." The text of the union security clause leaves out the mandated grace period for incumbent employees who have not joined the union. The text is therefore incapable of a lawful interpretation, and the contract cannot serve as a bar.

Therefore, even under existing law Petitioner was entitled to the election that was held by mail ballot in July 2020, and those now-impounded ballots should be promptly counted.

CONCLUSION

The contract bar contradicts the Act's text, was impermissibly concocted by the Board with little regard for employee rights, and was expanded over the decades to further infringe upon employee rights. Too many employees have seen their petitions dismissed based upon legal technicalities out of their control. The Board should correct its errors and return to its original and proper understanding of the Act—that a contract bar is neither necessary nor permitted. Alternatively, the Board should modify the bar as specified above. In any event, Petitioner's election was properly held in accordance with the Regional Director's DDE dated April 8, 2020, and the ballots should be promptly counted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief on the Merits was e-filed with the NLRB's Executive Secretary and served via email on the following parties or counsel this 21st day of August, 2020:

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